(2)

No. 88-54

In The

Supreme Court of the United States

October Term, 1988

MICHAEL VITIELLO,
on behalf of himself and the certified class of
DATA ACCESS SYSTEMS, INC., shareholders,

Petitioner,

v.

I. KAHLOWSKY & Co., PETER CUNICELLI,
TOLINS & LOWENFELS, and
ROGER A. TOLINS,

Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS TOLINS & LOWENFELS AND ROGER A. TOLINS IN OPPOSITION

RONALD J. RICCIO
(Counsel of Record)
Office of the Dean
Seton Hall Law School
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8500

-and-

ROBINSON, WAYNE & LA SALA
One Gateway Center
Newark, New Jersey 07102
(201) 621-7900

Attorneys for Respondents Tolins & Lowenfels and Roger A. Tolins

JOHN B. LIVELLI,
Of Counsel and
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals correctly applied recent decisions of this Court in holding that the "one-year/three-year" limitation provision found in the Securities Exchange Act of 1934 should be "borrowed" for implied private actions under Section 10(b) of that Act.

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STATEMENT OF THE CASE

This case involves allegations of securities fraud by plaintiff-petitioners in the sale of common stock of Data Access Systems, Inc. ("DASI") from October 31, 1978 through June 22, 1981. The latter date is the date on which the claims were held to have accrued by the District Court, *See In re Data Access Systems Securities Litigation*, 103 F.R.D. 130, 150 (D.N.J. 1984), and District Court Slip Opinion below (Pet. App. 57a). The initial complaint herein was filed on June 23, 1981, and the First Consolidated Amended Class Action Complaint (the "First Class Action Complaint") on October 26, 1981. The sole federal claims at issue were asserted under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and SEC Rule 10b-5 promulgated thereunder.

The allegations in the initial complaint and the First Class Action Complaint centered around the 1979 DASI offering prospectus, which was alleged to have been materially false and misleading. Numerous parties were sued in those complaints, including DASI's principal accountants, Touche Ross & Co., the lead underwriter, D. H. Wallach, and others. *Not* named in either complaint were the law firm of Tolins and Lowenfels ("T & L") or attorney Roger A. Tolins, two of the respondents on the instant Petition. This omission cannot be attributed to plaintiffs' ignorance, because the 1979 DASI prospectus explicitly identified Tolins and Lowenfels as "special counsel for [DASI]" who would be "pass[ing] upon" "[l]egal matters in connection with" the common stock offered (DASI Prospectus, p. 61, excerpt at Resp. App. 2-3).

That petitioners' decision not to sue T & L or Tolins initially was deliberate, and not the result of ignorance, excusable or otherwise, was confirmed several months later. On March 15, 1982, a "Special Agent", appointed by the District Court in a civil action brought by the Securities and Exchange Commission (SEC) against DASI, rendered a lengthy report regarding the allegations common to the SEC action and this action. That report identified both Roger Tolins and Lewis Lowenfels as persons providing information to the Special Agent relative to his investigation.

In the wake of the Special Agent's report, petitioners in May 1982 filed a Second Consolidated Amended Class Action Complaint (the "Second Class Action Complaint"). Again, that Complaint failed to name T & L or Tolins as defendants. Moreover, that Complaint contained the following allegation:

> "19. Various other persons, firms, corporations, agents *and attorneys not named or made defendants herein have participated* as co-conspirators in offenses charged in this Complaint and have performed acts and made statements in furtherance thereof. Such persons, firms, corporations, agents *and attorneys did also know of and substantially assisted* in effectuating the unlawful scheme of offenses charged in this Complaint *and did thereby aid and abet therein.*" (Resp. App. 13) (emphasis added).

While the "attorneys" referred to in the above paragraph were not identified, the only attorneys later sued were T & L and Tolins.

Despite their awareness of the identity and role of T & L and Tolins, and of the fact that said parties had

relevant knowledge, plaintiff-petitioners chose not to interview or depose either Tolins or Lowenfels. Rather, petitioners claim that in 1985 they happened to see a copy of a transcript of a 1984 deposition of Tolins taken in another action, which purportedly revealed to them some basis for suing T & L and Tolins. However, Petitioners have consistently failed to identify a single answer given in that deposition which supposedly gave them a previously-unknown basis to sue T & L or Tolins, nor have they explained why they failed to depose Tolins.

The real reason for the belated decision to sue T & L and Tolins appears to be a partial settlement reached in 1985 between petitioners and defendant Touche Ross. Under the terms thereof, embodied in a March 15, 1985 Stipulation of Settlement (See excerpt at Resp. App. 4 *et seq.*), petitioners received 3.25 million dollars from Touche (¶ 2(a)) and agreed to pledge *future* recoveries to a "Recovery Fund", out of which Touche would receive the first $750,000, 50% of the next $2,000,000 and 35% of the next $2,142,857 (¶ 6). Further, Touche acquired an effective "veto" over any settlements under a certain amount (¶ 4(i)), and petitioners indemnified Touche against any liability on cross-claims against Touche by the other defendants, such as respondents herein (¶ 4 (b)). The settlement with Touche was approved by the District Court on July 2, 1985.

The net effect of the settlement with Touche was to create a fund to facilitate petitioners' continuation of the lawsuit, largely to shift control over decision-making from petitioners to Touche, and to create a substantial interest in their finding new supposed "deep pockets" to sue, such as respondents. Thus, the motion to file a "Third

Consolidated Amended Class Action Complaint" (the "Third Class Action Complaint"), naming respondents for the first time, was filed on September 10, 1985, two months after the Touche Ross settlement was approved. The motion was granted, and the Third Class Action Complaint was filed on January 7, 1986, more than 4½ years after the causes of action accrued and the initial complaint was filed, and almost seven (7) years after T & L was identified in the 1979 DASI prospectus. Respondents filed their motion to dismiss the Third Class Action Complaint on limitations grounds on February 20, 1986.

The primary question before the District Court on the dismissal motion was whether New Jersey's two-year Blue Sky Law limitations period should be "borrowed", or whether the State's six-year "catch-all" statute, used *inter alia* in state common law fraud contexts, should be applied. Respondents also urged the District Court to reconsider the borrowing methodology in Section 10(b) cases in light of *Wilson v. Garcia*, 471 U.S. 261 (1985), but did not at that stage argue that a limitations period from the federal securities laws be borrowed, so the latter issue was not before the District Court. The District Court ruled that the six-year State "catch-all" statute applied. The reason for the District Court's ruling was its belief that plaintiffs' allegations did not state a claim under the State Blue Sky Law, because respondents were not the actual "sellers" of DASI stock to plaintiffs, a purported requirement under that statute. The District Court read Third Circuit precedent as requiring the borrowing of the less-preferred catch-all statute used for common law fraud in such a case.

The District Court did not discuss *Wilson v. Garcia* in its opinion. However, it did certify two questions to the Third Circuit for review, and stayed proceedings pending such review. The first certified question raised the issue whether the State Blue Sky Law should be borrowed regardless of whether plaintiffs had effectively stated a claim thereunder. The second question related to whether plaintiffs had in fact stated a claim under the Blue Sky Law against respondents as "sellers", by alleging that they had "substantially participated and/or aided and abetted in the sale of securities to plaintiffs." (Pet. appendix, pp. 6a - 7a).

In their application to the Third Circuit Court of Appeals to bring on the certified appeal, T & L and Tolins relied not only on the *Wilson* case, but also on this Court's decision in *DelCostello v. Teamsters* 462 U.S. 151 (1983), suggesting to the Court of Appeals that it might well wish to consider using federal law as the source of borrowed limitations law in light thereof. When that court took the appeal, respondents briefed the question whether the Federal Securities Acts should be used as a borrowing source, particularly in light of this Court's decision in *Agency Holding Corp. v. Malley-Duff & Associates*, — U.S. — , 107 S.Ct. 2759, 97 L.Ed. 2d 121 (1987) ("*Malley-Duff*"), which was announced in the midst of the briefing process in the Court of Appeals. The borrowing of a federal rather than a State limitations period was the thrust of oral argument before the *in banc* Court of Appeals.

The Court of Appeals' unanimous[1] *in banc* decision to follow *Wilson, DelCostello* and *Malley-Duff,* and to borrow the express limitations period found in the Securities Exchange Act of 1934 in all Section 10(b) cases, represents the first time a court of appeals has considered the question in any detail in light of those recent decisions of this Court. The decision below therefore comes at the beginning of a period when the various courts of appeals will likely reconsider the Section 10(b) borrowing question in light of *Wilson, DelCostello, Malley-Duff,* and the Third Circuit *in banc* decision herein.

While the Court of Appeals below overruled the District Court's decision to apply a state common law limitations period, it expressly refused to decide whether its decision to apply the Exchange Act limitations period was to be applied "retroactively" in this case. The three dissenting judges, while agreeing with the majority on the borrowing issue, would have reached the retroactivity question, and would have held the Court's decision to apply *prospectively only, i.e.* not in this case. (The Court of Appeals subsequently applied its decision herein retroactively in another case). The retroactivity issue in this case will now have to be decided by the District Court and, whatever it decides, review of its decision will likely be sought in the Court of Appeals. If the decision is applied prospectively only, the second question certified below (regarding which State limitations statute to apply),

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[1]The three judges dissenting below agreed with the majority on the application of federal law, but would have applied the decision prospectively only, and not in this case. The majority did not reach the retroactivity question. See discussion *infra.*

not addressed below, along with tolling and other reserved issues of case-determinative impact, will have to be resolved. This Petition therefore seeks review now of an interlocutory ruling which may ultimately be rendered inapplicable to the parties in this case.

SUMMARY OF ARGUMENT

There Is No Need For The Court To Take Another Limitations "Borrowing" Case In Light Of Its Recent Decisions (Point I Below)

The Court in *Wilson, DelCostello* and *Malley-Duff* has already spelled out in step-by-step detail how courts are to approach limitations "borrowing" questions in cases involving federal implied private actions. This case simply constitutes an application of that prescribed process. This Court need not decide how its approach should be applied with respect to every implied action. Nor does the decision below impact on future cases brought by the SEC.

The Decision Below Does Not Conflict With Applicable Decisions Of This Court (Points II and III Below)

This Court has never held that state limitations law must be borrowed in Section 10(b) cases. It *has* held that *federal* law should be considered as a borrowing source as part of the *Wilson* borrowing analysis, and should be

used in an appropriate context. Further, it has never held that a legislated outside time limit on equitable tolling, such as that found in the Exchange Act provisions borrowed here, must be disregarded by courts in the borrowing process.

There Is No Conflict Among The Circuits On The Same Matter Involved In This Case (Point IV)

The decision below is the first to seriously consider, much less adopt, the federal-law-borrowing option in a Section 10(b) case in light of recent decisions of this Court. Because the other courts of appeal are now only beginning to consider this precise question, there is no "conflict" in the circuits on the "same matter" (Supreme Court Rule 17.1(a)), and no conflict may ever develop. The Court should allow time for the other courts of appeal to consider the question.

This Is Not The Appropriate Case For The Court To Decide The Questions Presented (Point V)

The Court of Appeals reserved on the question whether its decision should apply retroactively in this particular case. The Court should not address the questions presented in a case in which the applicability of its determination to the parties before it is uncertain.

LEGAL ARGUMENT

POINT I

THERE IS NO NEED FOR THE COURT TO TAKE THIS CASE; THE COURT HAS ALREADY SPELLED OUT THE APPROACH TO BE USED IN LIMITATIONS "BORROWING" CASES, AND NEED NOT DECIDE HOW THAT APPROACH APPLIES TO EVERY IMPLIED FEDERAL PRIVATE ACTION

In *Wilson v. Garcia*, *DelCostello v. Teamsters* and *Agency Holding Corp. v. Malley-Duff & Associates*, *supra*, this Court carefully considered the subject of the "borrowing" of statutes of limitations in implied federal private civil actions. The Court therein prescribed and refined the approach to be taken by lower courts in such cases. As can be seen from the Petition herein, petitioners do not contend that the Court of Appeals failed to follow the methodology prescribed in *Wilson*, *DelCostello* and *Malley-Duff*: petitioners only contend that the Court of Appeals reached the wrong result.

Because the Court need not revisit the general issue of limitations borrowing, and are not being asked to by petitioners anyway, there is no "special and important reason" (Rule 17.1(a)) to take this case. Nor is it necessary or even appropriate for this Court to decide how its already well-defined borrowing process should be applied with respect to each and every variety of implied federal private action. This is particularly so where, as here, no other prior precedent of the Court is implicated and where, as here, there has not yet been an opportunity for the other circuits even to consider the precise matter involved.

The lower courts already have the benefit of this Court's guidance in three recent relevant cases. As to some private actions, courts may follow that guidance and borrow limitations provisions from analogous state law. As to others, the borrowing of federal law may be appropriate within the Court's guidelines. Just because the first court of appeals to follow the new guidelines in a Section 10(b) case borrowed from federal law, instead of from state law as had been the prior practice, is insufficient reason for this Court to grant *certiorari*.[2]

POINT II

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT; THOSE DECISIONS REQUIRE CONSIDERATION OF FEDERAL LAW AS A LIMITATION BORROWING SOURCE, AND THIS COURT HAS NEVER HELD THAT STATE LAW MUST BE BORROWED IN SECTION 10(b) CASES

The first "question presented" by petitioners rests on a faulty premise: decisions of this Court do not "require borrowing a limitations period drawn from state law" in all implied federal actions. In fact, the

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[2]Petitioners' suggestion that the decision below will affect Section 10(b) enforcement actions brought by the Securities and Exchange Commission in the Third Circuit is unfounded. This case is not an SEC action, and the application of the Court of Appeals' decision to SEC cases was not even addressed below. Further, the courts which have addressed the question have held that the SEC is not affected by borrowed statutes of limitation whether seeking injunctive relief or monetary relief, such as "disgorgement" of profits for the benefit of injured investors. *See* e.g. *SEC v. Glick*, 1980 CCH Fed.Sec. L.Rptr., ¶97,535 (D.Nev. 1980) (injunctive action); *SEC v. Continental Advisors*, 1978 CCH *Id*, ¶96,489 (D.D.C. 1978) (disgorgement, relying on *United States v. Summerlin*, 310 U.S. 414 (1940)).

leading case relied on by petitioners for this contention, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), is to the contrary. The Court there "made [it] clear" that application of state limitations periods is done "as a matter of interstitial fashioning of remedial details . . . and not because the Rules of Decision Act or the Erie doctrine requires it . . . [A]s Holmberg recognizes, neither Erie nor the Rules of Decision can now be taken as establishing a *mandatory* rule that we apply state law in federal interstices." *DelCostello v. Teamsters, supra*, 462 U.S. at 160 n13 (emphasis by the Court).

Not only is the borrowing of state provisions not required in all implied federal actions, but consideration of federal law as a possible borrowing source *is* required in all cases. The Court in *Malley-Duff, supra*, 97 L.Ed.2d at 128, made it clear that the "inquiry . . . whether a federal or state statute of limitations should be used" is part of the borrowing process mandated by *Wilson v. Garcia*. Thus, in *Malley-Duff*, the Court looked to federal not state law for an analogous limitations provision for an implied federal private action, as it had in *DelCostello*, in *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958), and in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

Nor was the Court of Appeals' consideration of the federal law borrowing alternative pursuant to *Malley-Duff* precluded by any holding of this Court requiring borrowing of state limitations law in a Section 10(b) context. Petitioners cite only to *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210n29 (1976), in which the Court stated:

> "Since no statute of limitations is provided for civil actions under § 10(b), the law of limitations of the

> forum State is followed as in other cases of judicially implied remedies. See *Holmberg v. Armbrecht,* 327 U.S. 392, 395, 90 L.Ed. 743, 66 S.Ct. 582, 162 ALR 719 (1946), and cases cited therein. Although it is not always certain which state statute of limitations should be followed, such statutes of limitations usually are longer than the period provided under § 13 [of the Securities Act of 1933, 15 U.S.C. § 77m]. 3 L. Loss, supra, [*Securities Regulation,* Chap. 11C] n 17, at 1773-1774. As to costs see n 30, infra."

See also Herman & MacLean v. Huddleston, 459 U.S. 375, 384n18 (1983) (in which the Court, citing *Ernst & Ernst,* noted that ". . . courts look to the most analogous statute of limitations of the forum State . . ." in Section 10(b) cases). In neither *Ernst & Ernst* nor *Herman & MacLean* was the Court faced with a statute of limitations issue. As the Court of Appeals below correctly concluded, this Court's passing reference in those cases to lower court practice under *Holmberg* and prior to *Malley-Duff* does not constitute a holding requiring the borrowing of State limitations provisions in Section 10(b) cases.

POINT III

THE EXCHANGE ACT LIMITATIONS PERIOD BORROWED BY THE COURT OF APPEALS INCORPORATES WITHIN IT A THREE-YEAR TOLLING PERIOD; NO DECISION OF THIS COURT REQUIRES UNLIMITED TOLLING WHERE CONGRESS HAS PROVIDED OTHERWISE

Petitioners quote certain general statements found in a few of this Court's opinions to suggest that there is some rule that *unlimited* equitable tolling must be read into every federal fraud statute. The Court has never so held, as will be discussed below. However, it should be

noted that the express Exchange Act limitations period borrowed below *does* provide for tolling, *i.e.* the one-year limitations period provided for may be tolled for a period up to three years from the date the transactions occurred.

Petitioners did not argue below that the Exchange Act "one-year/three-year" limitations period could not be borrowed because it contains a built-in tolling cut-off. This fact is not surprising, because this Court has never held that the equitable tolling doctrine requires or even allows unlimited tolling, where Congress has spoken otherwise. The statement quoted by petitioners in *Holmberg v. Armbrecht, supra* at 397, to the effect that tolling is "read into every federal statute of limitation," was made in a case not involving a "dual" limitations statute, such as those in the Exchange Act. Further, as Justice Frankfurter also stated in the *Holmberg* opinion: "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive" (at 395).

Thus, assuming *arguendo* that there were some judge-made rule that unlimited tolling is preferred in fraud cases, such rule would have to yield where Congress has determined to limit tolling for a certain class of fraud claims. That is precisely what Congress has done with respect to federal securities fraud claims. There is no question that Congress considered and rejected arguments similar to those raised by petitioners in determining that claims brought under the securities Acts should not be allowed to survive unasserted for an indefinite period. Instead, Congress balanced the reasonable needs of a diligent aggrieved investor for time to discover a fraud,

against the need of the securities marketplace to work with a measure of certainty and repose, free from the lingering danger of claims far removed in time from the transactions involved. For a brief discussion of the Congressional debates concerning the decision to place an outside limit on federal securities fraud claims, see Bloomenthal, *Securities Law Handbook* (1987-1988 Ed.), § 11.09, pp. 502-508. *And see Report of the [ABA] Task Force on Statutes of Limitations for Implied Actions*, 41 Bus. Law. 645 (1986); *Norris v. Wirtz*, 818 F.2d 1329, 1331-1333 (7th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 329, 98 L.Ed.2d 356 (1987)

As observed by the court in *Norris v. Wirtz, supra*, it would indeed be incongruous, and would clearly frustrate the intent of Congress, to "disqualify" for borrowing purposes an otherwise analogous uniform limitations period prescribed by Congress to govern virtually every express private action in the very statutory act in which the pertinent implied action is found. Similarly, it would be absurd to hold that the one-year "half" of the express limitations provision at issue here may be borrowed, but the three-year "half" is not suitable, because it reflects a Congressional policy determination regarding securities claims which conflicts with some purported unlimited tolling rule used by courts generally in other contexts. The fact remains: no decision of this Court in letter or spirit precludes the borrowing of an otherwise appropriate federal limitation provision simply because it provides for limited rather than unlimited tolling.

POINT IV

THERE IS NO CONFLICT IN THE CIRCUITS ON THE SAME MATTER RAISED IN THE PETITION; THE OTHER CIRCUITS HAVE YET TO CONSIDER THE MATTER, AND CONSENSUS RATHER THAN CONFLICT MAY WELL DEVELOP

Petitioners contend that the decision below is in "conflict" with decisions of the other circuits, because the other circuits all look to state law for borrowing purposes in Section 10(b) cases. However, this is not the type of "true" conflict envisioned by Rule 17.1(a), nor is it with respect to the "same matter" as provided for therein. *See* discussion in Stern, Gressman & Shapiro, *Supreme Court Practice* (1986), § 4.4, p. 197 *et seq.* The decision below simply constitutes the first in which a Court of Appeals seriously considered the federal law borrowing alternative in a Section 10(b) context in light of *Wilson*, *DelCostello* and *Malley-Duff*.

Indeed, the decision below for the first time presents a way out of the confusion, uncertainty and conflict which has plagued courts and litigants alike on Section 10(b) limitations issues for the last twenty or thirty years. See ABA Task Force Report, *supra*. The decision below may herald a new era of consensus, uniformity and certainty in this area, as the various other courts of appeal have an opportunity to consider the federal alternative, to see how it works in comparison to the old "patch-work" system, and to follow the lead of the unanimous, *in banc* Third Circuit. It is neither necessary nor desirable for this Court to pre-empt that process at its inception. *Supreme Court Practice*, *supra* at pp. 199-200 and cases cited. Rather, the unfolding of that process will provide the Court

with the benefit of the thinking of other judges and commentators, and with a comparative record with which to evaluate the most appropriate borrowing alternative, should the Court determine to reach the question at a later time.

There is no question but that the decisional landscape is not yet ripe for this Court's intervention. Apart from an occasional passing comment in a few cases, *see e.g. Sentry Corp. v. Harris*, 802 F.2d 229, 231n1 (7th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 1624, 95 L.Ed.2d 199 (1987), the federal borrowing alternative has so far only been considered in a handful of cases, almost none with any extended discussion. It was considered at greatest length in *Norris v. Wirtz, supra*, where the Seventh Circuit Court of Appeals felt unable to take the step of borrowing the Exchange Act limitations period, although it also felt such alternative vastly preferable and more consistent with the intent of Congress. The *Norris* court, however, did not have the benefit of *Malley-Duff* nor of the opinion below herein, and inexplicably, failed to discuss and consider the impact of *Wilson* or *DelCostello*.

The other pre-*Data Access* decisions in the courts of appeal are even less instructive. In *Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369 (9th Cir. 1988), Judge Aldisert, sitting by designation, who wrote the majority opinion below herein, wrote a concurring opinion urging the federal borrowing alternative in that Section 10(b) case. The majority, however, did not address the question. The court in *Jensen v. Snelling*, 841 F.2d 600, 606 (5th Cir. 1988),

refused to borrow an Exchange Act express limitation provision in a Section 10(b) case without any extended discussion. The court cited *Malley-Duff*, but did not cite or discuss *Wilson* or *DelCostello*. The court in *Friedlander v. Troutman Sanders Lockerman*, 788 F.2d 1500 (11th Cir. 1986) re-evaluated its approach to Section 10(b) limitations borrowing in light of *Wilson*, but did not have the benefit of *Malley-Duff* and did not even consider federal law as a borrowing source.

Only one court of appeals case decided after the decision below refers to the decision. In *Durham v. Business Management Associates*, 847 F.2d 1505, 1508 (11th Cir. 1988), the court cited earlier Eleventh Circuit precedent in approving the borrowing of a state limitations statute, and added a "but see" reference to the *Data Access* decision without further discussion of the federal law alternative. The court did not cite or discuss *Wilson, DelCostello* or *Malley-Duff*, nor even its own important decision in the *Friedlander* case.

This tentative and meager record reveals that the bench and the bar need more time to consider the Court's new approach to borrowing as it applies to Section 10(b) cases. The decision below will doubtless accelerate that process, sensitizing the courts to the need for a fresh look at the question. This Court should let the re-evaluation process go forward at the lower court level, and step in only when, and if, a true and focused conflict develops. That time has not yet come.

POINT V

EVEN IF THE COURT WERE INCLINED TO CONSIDER THE QUESTIONS PRESENTED IN THE PETITION, IT SHOULD NOT DO SO IN THIS CASE, BECAUSE ITS DECISION MAY BE ADJUDGED INAPPLICABLE TO THE PARTIES HEREIN

As noted *supra*, the Court of Appeals did not reach the question of whether its decision should be applied to the parties in this case. The three dissenting judges would not have done so. Later, in *Hill v. Equitable Trust Co.*, — F.2d —, CCH Fed. Sec. L. Rptr., Current, ¶ 93,919 (3d Cir. July 14, 1988), the Court of Appeals applied its *Data Access* decision retroactively. However, it is uncertain whether the District Court, applying this Court's guidelines in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) in light of the *Hill* decision, will find retroactivity here. If the District Court follows the pre-*Hill* opinion of the three dissenting judges below herein, and holds that the *Data Access* decision should not be applied to the parties here, and is upheld by the Court of Appeals, the questions raised by the Petition will be of no relevance to these parties.

With this case in such a posture, even if the Court were inclined to address the issues raised by the Petition now, it should not grant certiorari in this case. It would be more appropriate for the Court to take a case in which the parties have a definite and certain stake in the outcome.

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CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

RONALD J. RICCIO
(Counsel of Record)
Office of the Dean
Seton Hall Law School
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8500

-and-

ROBINSON, WAYNE & LA SALA
One Gateway Center
Newark, New Jersey 07102
(201) 621-7900

Attorneys for Respondents Tolins & Lowenfels and Roger A. Tolins

JOHN B. LIVELLI,
Of Counsel and
On the Brief

August 4, 1988

APPENDIX

[Cover Page of Prospectus:]

D A S

650,000 Shares

DATA ACCESS SYSTEMS, INC.

Common Stock

On February 13, 1979, the closing bid and asked prices for the Common Stock in the over-the-counter market, as reported by NASDAQ were $11½ and $12½, respectively. See "Price Range of Common Stock."

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS, ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to Public	Underwriting Discounts and Expenses (1)	Proceeds to the Company (2)
Per Share	$11.00	$1.00	$10.00
Total Minimum	$7,150,000	$650,000	$6,500,000
Total Maximum(3)	$7,865,000	$715,000	$7,150,000

(1) Excludes $100,000 non-accountable expense allowance payable to the Underwriters' Representative. See "Underwriting."

(2) Before deducting expenses, including legal and accounting fees and printing costs, estimated at $320,000 (approximately $.49 per share assuming non-exercise of the Underwriters' overallotment option).

(3) Assuming full exercise of the 30-day option granted by the Company to the Underwriters to purchase, on the same terms, up to an additional 65,000 shares to cover any overallotments. See "Underwriting."

The Common Stock is being offered by the several Underwriters named herein, subject to acceptance by them, approval by counsel and certain other conditions. The Underwriters reserve the right, in their discretion, to reject in whole or in part, any order for the purchase of Common Stock.

D.H. WALLACH, INC.

The date of this Prospectus is February 14, 1979

* * *

[From page 61 of Prospectus:]

In the event the $7,000,000 insurance companies' loan is consummated upon completion of this offering, the Company will pay the sum of $210,000 to D. H. Wallach, Inc. in connection with arranging for and negotiating such loan and for acting as a financial advisor during the life of the loan. No assurances can be given that such loan will be consummated. See "Business—Financing Arrangements."

Frank J. Lockwood, Director of Corporate Finance of D. H. Wallach, Inc., Representative of the Underwriters has been nominated by management for election to the Company's Board of Directors.

LEGAL OPINIONS

Legal matters in connection with the Common Stock offered hereby will be passed upon by Tolins & Lowen-

fels, 540 Madison Avenue, New York, New York 10022, special counsel for the Company and by Blank, Rome, Comisky & McCauley, 4 Penn Center Plaza, Philadelphia, Pennsylvannia and Adler, Greenberg, Hindy & Turner, 150 East 58th Street, New York, New York 10022, counsel for the Underwriters.

EXPERTS

The financial statements and schedules and the information appearing under "Consolidated Statements of Earnings" included in this Prospectus and Registration Statement have been examined by Touche Ross & Co., I, Kahlowsky & Co. and LaFrance, Walker, Jackley & Saville, independent certified public accountants as stated in their reports appearing herein, and are included in reliance upon the reports of such firms and their authority as experts in accounting and auditing.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
HON. STANLEY S. BROTMAN

	) MASTER FILE
	) NO. 81-1923
DATA ACCESS SYSTEMS	)
SECURITIES LITIGATION	) STIPULATION
	) OF
	) SETTLEMENT
THIS DOCUMENT	) BETWEEN
RELATES TO:	) PLAINTIFFS
ALL ACTIONS	) AND
	) DEFENDANT
	) TOUCHE
	) ROSS & CO.

* * *

2. (a) In compromise and full settlement of all claims for relief asserted or which could have been asserted against the Touche releasees by plaintiffs and the Data Access class arising out of or relating to the matters, transactions, and events which are the subject of the Data Access Systems Securities Litigation, Touche shall, upon the execution of this Stipulation by counsel for Touche and lead counsel for plaintiffs and class members, deliver the following sums to the firms of Barrack, Rodos & Bacine, lead counsel for plaintiffs and class members, and Shea & Gould, counsel for Touche (the "Escrow Agents"), to be held in escrow, except as provided in subparagraph "2(b)" hereof, pending final approval of the settlement embodied in this Stipulation: $3,205,000 shall be delivered jointly to Barrack, Rodos & Bacine and Shea & Gould and $45,000 shall be delivered solely to Barrack, Rodos & Bacine. Both funds, including interest earned thereon and less any withdrawals expressly per-

mitted herein, shall be referred to collectively hereinafter as the "Settlement Fund". The Escrow Agents agree to hold the $3,205,000 in escrow pursuant to the terms of this Stipulation and to invest the same, as soon as practicable, at current market rates in certificates of deposit, money market funds, or United States Treasury bills (the "escrow securities"). Up to the date of the hearing on whether this partial settlement should be approved, all such escrow securities shall be due and payable in accordance with their respective terms 13 weeks or less from the date of purchase. Except as provided in subparagraph "2(b)", the Escrow Agents shall reinvest the proceeds of the escrow securities as they mature in similar escrow securities at then current market rates.

* * *

4. Conditioned upon final approval of the settlement as defined in paragraph "3" of this Stipulation, plaintiffs and class members hereby agree as follows:

(a) To deliver any monies recovered from any other defendant in the Data Access Systems Securities Litigation, whether by way of judgment or settlement, into a separate escrow (the "Recovery Fund") to be held by Barrack, Rodos & Bacine, as sole Escrow Agent, and invested in the same manner as herein provided regarding the Settlement Fund; provided, however, that there shall be no payments made out of the Recovery Fund except in accordance with paragraph "6" of this Stipulation.

(b) To idemnify Touche and hold it harmless from any cross-claim, third-party claim, or subsequently asserted claim for contribution or indemnity

made by any other defendant in the Data Access Systems Securities Litigation (i) with respect to any judgment entered against such other defendant in favor of plaintiffs and class members, or any of them, arising out of any of the matters, transactions, or events which are the subject of the Data Access Systems Securities Litigation or (ii) with respect to monies paid by such other defendant (but not including DASI securities issued to plaintiffs and the class members in connection with the DASI reorganization proceedings) to plaintiffs and class members, or any of them, in settlement of the claims asserted by plaintiffs, on behalf of themselves and the class members, against such other defendant with respect to any of the matters, transactions or events which are subject of the Data Access Systems Securities Litigation.

(c) Upon the entry of a judgment for contribution and/or indemnity in favor of any other defendant in the Data Access Systems Securities Litigation against Touche, to pay such other defendant all or part of the Recovery Fund as required to fully satisfy the judgment in favor of such defendant against Touche.

(d) In the event that the judgment referred to in subparagraph "4(c)" is entered at the same time as the judgment of plaintiffs and class members against such other defendant, to reduce the amount of the judgment that they collect against each such other defendant by the amount of any judgment which such other defendant is entitled to collect against

Touche and to obtain and deliver to Touche a general release in favor of the Touche releases from such other defendant.

(e) In the event that any other defendant from whom plaintiffs recover judgment or receive any settlement monies has not asserted a claim for contribution and/or indemnity against Touche in the Data Acess Systems Securities Litigation, to continue to hold that portion of the Recovery Fund representing monies recovered or collected from such other defendant in escrow until (i) the expiration of the applicable statute of limitations[1] governing such a claim for indemnity or contribution by such other defendant or (ii) the adjudication of any claim for contribution or indemnity which is thereafter asserted by such other defendant against Touche prior to the expiration of the applicable statute of limitations, which ever is later, or (iii) the delivery of a release by such other defendant to the Touche releases with respect to all of its claims for contribution and/or indemnity.

(f) In the event a judgment is entered against Touche in favor of any other defendant with respect to a claim for contribution or indemnity not asserted in the Data Access Systems Securities Litigation, but arising out of or relating to the matters, transactions, or events which are the subject of the Data Access Systems Securities Litigation, to pay such other defendant all or part of the Recovery Fund as required

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[1]As determined by counsel for Touche.

to fully satisfy the judgment in favor of such other defendant against Touche.

(g) In the event plaintiffs and the class members desire to settle the Data Access Systems Securities Litigation with any other defendant, or to settle any claims for relief they may have against a person or entity not presently a defendant in the Data Access Systems Securities Litigation, but arising out of or relating to the matters, transactions or events which are the subject of the Data Access Systems Securities Litigation, to condition such settlement upon the execution and delivery to Touche of a release by such defendant, other person or entity for any claim which such defendant, person or entity has or could have against the Touche releasees.

(h) In the event Touche settles any claim for contribution or indemnity asserted against it by any other defendant in the Data Access Systems Securities Litigation, to pay such other defendant out of the Recovery Fund such sum as Touche is required to pay pursuant to the terms of the settlement.

(i) Until the Recovery Fund, after all payments required by subparagraphs "4(c)", "4(f)", and "4(h)", exceeds $$1,500,000, to not settle the Data Access Securities Litigation with any other defendant without the prior written approval of counsel for Touche.

(j) The obligation of plaintiffs and the class members to indemnify Touche pursuant to this paragraph "4" shall be limited to the sum then held in

the Recovery Fund. No monies recovered or collected from any other defendant shall be distributed out of the Recovery Fund until plaintiffs and the class members have satisfied their obligation to indemnify Touche with respect to contribution or indemnity claims which that defendant has or may have against Touche.

5. Conditioned upon final approval of the settlement as defined in paragraph "3" of this Stipulation, Touche agrees to defend against any claim for contribution or indemnity with respect to which plaintiffs and the class members have agreed to hold Touche harmless. Until the aggregate sum of $4,892,857 is paid out of the Recovery Fund pursuant to paragraph "6" of this Stipulation, Touche shall have the right to determine all decisions with respect to the conduct of such defense, or the settlement of such a claim. Thereafter, Touche shall continue to have the right to determine all decisions with respect to the conduct of its defense, but shall not settle any such contribution or indemnity claims without the prior written approval of lead counsel for plaintiffs and the class members. Touche shall be entitled to defend all such claims for relief with counsel of its own selection and shall pay the fees and expenses of its counsel.

6. Following the adjudication, settlement or expiration of all claims for contribution and/or indemnity that any defendant from whom plaintiffs recover judgment or collect settlement monies has or may have against Touche, that portion of the Recovery Fund representing monies recovered or collected from such defendant, less any amount repaid to such defendant pursuant to subparagraphs

"4(e)", "4(f)", or "4(h)", shall be released from escrow and paid to Touche, plaintiffs and the class members as follows:

(a) Touche shall be paid the first $750,000, or portion thereof, released from the Recovery Fund.

(b) Touche and plaintiffs and the class members shall each be paid fifty percent (50%) of the next $2,000,000, or portion thereof, released from the Recovery Fund.

(c) Touche shall be paid thirty-five percent (35%) and plaintiffs and the class members shall be paid sixty-five percent (65%) of the next $2,142,857, or portion thereof, released from the Recovery Fund.

(d) Plaintiffs and the class members shall be paid all further monies released from the Recovery Fund.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
HONORABLE STANLEY S. BROTMAN
(Filed May 18, 1982)

IN RE: DATA ACCESS SYSTEMS SECURITIES LITIGATION	MASTER FILE NO. 81-1923
MICHAEL VITIELLO, STANLEY SHERIN, PAMELA MARTIN, J.H. LEVIT, GILES FRANKLIN, IRWIN KURLANDER, PETER DONIGER, ALEXANDRIA A. RICHARDSON, STEVEN STONE, ERNEST GREENBERG, CARMEN PECORARO, and HJALMAR S. SUNDIN, RAYMOND FASTEAU, ERROLL STOLTZ, MARVIN NOTT, JOHN INFANTE, Plaintiffs, v. GERALD R. CICCONI, ROBERT T. COPPOLETTA, BENEDICT H. PARATORE, HOWARD B. CRYSTAL, JAMES T. SIMPSON, PHILIP HARTLEY, THOMAS COPPOLETTA, JOHN J. WILK, FRANK LOCKWOOD,	CLASS ACTION

PAUL MATZKO,	)	
ROBERT B. FRANKLIN,	)	
MICHAEL J. HAGGERTY,	)	
PETER V. DIGUILIO,	)	JURY TRIAL
ANTHONY J. SIMEI,	)	DEMANDED
MARIO CAPONEGRO,	)	
GERALD LAVINE,	)	
DOUGLAS KREINER,	)	
CLARENCE REED,	)	
MICHAEL EVANGELISTA,	)	
JOHN GAULT,	)	
RUSSELL HETTINGER,	)	
SAMAY INDUSTRIES, INC.,	)	
E-O DATA CORP.,	)	
CAMBRIA CORP.,	)	
J&J PROPERTIES,	)	
GAULT ASSOCIATES, INC.,	)	
TRANSNET CORP.,	)	
D&R CONTRACTORS,	)	
JOHNSON-FERNE CORP.,	)	
MARK SERV CO.,	)	
TOUCHE ROSS & CO., and	)	
D. H. WALLACH, INC.,	)	
DATA ACCESS SYSTEMS, INC.,	)	
	)	
Defendants.	)	
	)	

SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

(Filed May 18, 1982)

Plaintiffs, for their Second Consolidated Amended Class Action Complaint ("Complaint") against the defendants, allege:

JURISDICTION AND VENUE

* * *

17. Defendant Touche Ross & Co. ("Touche Ross") was and is a firm of certified public accountants, with a place of business in the District of New Jersey. Touche was the auditor for defendant DAC during the times of the wrongs alleged herein, provided various accounting services, and rendered unqualified opinions with respect to various financial statements of DAC, including the statements appearing in DAC's annual reports for the fiscal years ending August 31, 1978, 1979 and 1980.

18. Defendant D.H. Wallach, Inc. has a principal place of business located at 1700 Market Street, Suite 3222, Philadelphia, Pennsylvania and does business in New Jersey. Said defendant was the managing underwriter of the February 14, 1979 public offering by DAC of 710,000 shares of common stock preferred to in Count II herein.

19. Various other persons, firms, corporations, agents and attorneys not named or made defendants herein have participated as co-conspirators in offenses charged in this Complaint and have performed acts and made statements in furtherance thereof. Such persons, firms, corporations, agents and attorneys did also know of and substantially assisted in effectuating the unlawful scheme of offenses charged in this Complaint and did thereby aid and abet therein.

CLASS ACTION ALLEGATIONS

* * *